Mark Tunick, "Efficiency, Practices, and the Moral Point of View:
Limits of Economic Interpretations of Law"
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[77] Law and economics theories treat legal issues as economic problems. Because society has limited resources to devote to its legal institutions, it is important to consider their economic costs in deciding how these institutions are best operated. I shall argue, however, that for a theory to be persuasive at either explaining or prescribing legal rules, it needs to recognize moral ideals apart from economic efficiency, such as justice and fairness, that may account for why we have legal institutions in the first place and which may be essential to our finding them acceptable.

I. Law and Economics as Explanative and Normative Theory

Economic approaches to law generally assume that human behavior can be understood as the result of people's rational choices to maximize their utility or satisfy their preferences. Some law and economics proponents use this assumption to explain why practices emerge or predict how people will respond to rewards or punishments.[1] Some use this and another assumption, that social and legal policy *ought* to be driven by the goal of promoting or maximizing social utility or welfare, to generate prescriptive or normative theories.[2] For example, on the law and economics approach, the purpose of punishment is to deter undesirable conduct that diminishes social utility. A sanction deters by imposing a cost on potential criminals; the harsher the sanction, the higher the price of committing [78] crime. Imposing sanctions has a social cost that must be weighed against the utility of deterring crime. Criminals, as rational actors, will decide whether to commit a crime based on the expected utility of doing so, which is a function of both the severity of the sanction and the probability of apprehension.[3] Depending on the rate at which potential criminals discount the disutility of punishment, and the rate at which taxpayers discount enforcement costs, it may be optimal to threaten severe sanctions that will only be imposed

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[1] For example, Gary Becker, "A Theory of Marriage: Part II," *Journal of Political Economy* 82(2):S11-26 (1974); Thomas Ulen, "Human Fallibility and the Forms of Law," in Parisi and Smith, *The Law and Economics of Irrational Behavior* (Stanford University Press, 2005), 398; Steven Shavell, "Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent," 85 *Columbia Law Review* 1232 (1985); Frank Easterbrook, "Criminal Procedure as a Market System," *Journal of Legal Studies* 12:289-332 (1983); Kenneth Dau-Schmidt, "An Economic Analysis of the Criminal Law as Preference-Shaping Policy," 1990 *Duke Law Journal* 1 (1990); Robert Cooter, "The Intrinsic Value of Obeying Law," 75 *Fordham Law Review* 1275 (2006).

[2] I shall focus on Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002)(hereafter KS). See also, e.g., Easterbrook, "Criminal Procedure"; Gary Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76(2):169-217 (1968); Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3:1-44 (1960).

[3] Becker, "Crime and Punishment."

rarely, so long as the expected utility of committing a crime is negative.[4] If a fine of $10 would deter illegal parking, it may be efficient to impose a $10,000 fine with a probability of enforcement of 1/1000: the expected disutility of illegally parking would be $10 but enforcement costs might be substantially reduced.[5] High fines may upset many people, and be regarded as unjust (because disproportionate to the offense), and unfair to the 1 in 1000 who are caught.[6] But if maximizing utility is our only goal, justice and fairness are beside the point (though one might convince oneself that getting caught is like losing a gamble, and losing a gamble isn't unfair).[7]

In the ways just described, law and economics proponents follow the path of Jeremy Bentham, who also explained human behavior as utility-maximizing, and who also believed the principle of utility offers the only rational guide for determining what the law ought to be. While conceding that it is not susceptible of any direct proof , "for that which is used to prove everything else, cannot itself be proved," Bentham had no question that the principle of utility—"that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question"—is our only rational guide: "Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light."[8] Some proponents of law and economics share Bentham's obstinate commitment to a single principle. They take what I call a "totalizing" viewpoint, by which I mean the view that a single standard—utility, or efficiency, or welfare—provides correct policy prescriptions as well as explanations and understandings of practices, and that dismisses as having no independent weight other considerations such as justice and fairness. I believe that insofar as law and economics proponents obstinately take a totalizing point of view, they fail to provide a persuasive [79] general explanative or normative theory, just as Bentham failed, as is evident from his rebuked efforts to institute governments of nations on his principle of utility.

Law and Economics and the Moral Point of View

Not all law and economics proponents bluntly reject considerations apart from utility, efficiency, or welfare. Other considerations are often briefly acknowledged and put to one side.[9]

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[4] A. Mitchell Polinksy and Steven Shavell, "On the Disutility and Discounting of Imprisonment and the Theory of Deterrence," *Journal of Legal Studies* 28(1):1-16 (1999).

[5] A. Polinsky, *An Introduction to Law and Economics*, 2nd ed. (Boston: Little Brown, 1989), 77-78. People may not assess expected utility as the example suggests. Studies in behavioral economics on optimism bias, availability bias, and prospect theory suggest this high penalty/low enforcement level strategy may fail. See Christine Jolls, "On Law Enforcement with Boundedly Rational Actors," in Parisi and Smith.

[6] Ian Urbina, "High Fines for Speeding Anger Virginians," *New York Times*, July 19, 2007 (noting 100,000 Virginians signed a petition against $2500 fines for driving 20 mph or more above the speed limit, but that some people acknowledge they are more careful when driving).

[7] KS, 67 (a sanction dictated by welfare economics is superior to a fair sanction); Richard Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little Brown and Co., 1992), 230 (lotteries aren't unfair).

[8] Jeremy Bentham, *The Principles of Morals and Legislation* (NY: Prometheus Books, 1988, orig. 1781), ch. 1, §§11, 2, 1.

[9] Coase, 19 ("questions of equity apart"); Easterbrook, 291 (puts to one side goals of punishment other than deterrence); Ulen, "Human Fallibility," 399; Shavell, "Criminal law," 1232 fn (recognizing other goals of punishment besides deterrence); Richard Posner, "Common-law Economic Torts: An Economic and Legal Analysis," 48 *Arizona Law Review* 735 (2006), 736 (conditionally defends economic analysis of tort law "if the only normative issue" is the law's efficiency); R. Posner, *Economic Analysis of Law*, 13-14 (recognizing limits of efficiency as an ethical criterion), 27 ("there is more to justice than economics"); Guido Calabresi and A. Douglas Melamud, "Property Rules, Liability Rules, and Inalienability," 85 *Harvard Law Review* 1089 (1972), 1128

But some of the most visible proponents explicitly dismiss the contribution that non-utilitarians can make to our understanding of the law; or they reduce the concern for justice, fairness, or retribution to a "taste" that utilitarians enter into their calculation but do not otherwise weigh in policy deliberations.[10] They are sharply critical of a moral point of view that is not controlled by economic analysis and, like Bentham, they seem incredulous that anything other than augmenting social utility can count as a good reason for deciding upon a law or policy. Richard Posner criticizes those who do moral philosophy, which he denigrates with the label "academic moralism," for their inability to solve any modern social problems: "We can get along without doing or even thinking about moral theory."[11] Moral philosophy doesn't provide the needed economic tools for policy analysis, and is "insipid."[12] Kaplow and Shavell, while perhaps less overtly hostile to moral philosophy than is Posner, similarly express an inability to comprehend any ground for law and social policy other than welfare or social utility.[13] They oppose appeals to fairness, retribution, or a conception of right that is independent of welfare, because doing what is fair, just, or right may make everyone worse off from the standpoint of social utility.[14]

[80] Many law and economics proponents conflate justifying a policy with *demonstrating* that it promotes welfare or utility. They identify their enterprise as scientific, though we must be careful to distinguish those who appropriately adopt a scientific method when investigating empirical questions, such as whether there is a statistically significant difference in the rate of certain crimes depending on whether discretionary gun laws are present or absent, from those who refer generally to law and economics as a science without distinguishing questions for which a scientific method is and is not appropriate.[15] Associated with their self-identification as scientists, they believe their research goal is correct answers, discoverable by experts.[16] Because moral philosophy seems to them unable to produce correct answers, it having failed to resolve centuries old moral dilemmas, they regard questions of moral judgment as non-scientific matters of sentiment, preference, or taste, about which little can be intelligibly said.[17]

(efficiency is but "one view of the cathedral"); Lynn Stout, "Strict Scrutiny and Social Choice," 80 *Georgetown Law Journal* 1787 (1992), 1834 (acknowledging that moral theory "may better explain many aspects of constitutional law").

[10] KS, 448 (treating fairness or equality as a taste); Ulen, "Human Fallibility," 405 (treating fairness as a taste); Shavell, Foundations, 537-9 (treating retribution as a desire), 608; Don Kahan, "Social Meaning and the Economic Analysis of Crime," *Journal of Legal Studies* 27(2):609-622 (1998), 616-20 (treating retribution as a preference); Edward Glaeser and Bruce Sacerdote, "Sentencing in Homicide Cases and the Role of Vengeance," *Journal of Legal Studies* 32:363-81 (2003) (treating retribution as a taste).

[11] R. Posner, "The Problematics of Moral and Legal Theory," 111 *Harvard Law Review* 1637 (1998), 1671, 1638.

[12] Posner, "Problematics," 1670-1, 1639-40.

[13] KS, 299-300 (the retributive conception is "difficult to identify"); cf. 96, 163-5 (inability to understand a normative justification for adhering to promises).

[14] KS, discussed below; and Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004), 608 ("no deontological importance should be accorded [to moral notions]"—doing so would reduce social welfare).

[15] Those regarding law and economics as a science, generally, include Charles Rowley, "Social Sciences and Law: The Relevance of Economic Theories," *Oxford Journal of Legal Studies* 1(3):391-405 (1981), 391-2, 394; Thomas Ulen, "The Unexpected Guest: Law and Economics, Law and other Cognate Disciplines, and the Future of Legal Scholarship," 79 *Chicago-Kent Law Review* 403 (2004), 405, 408; R. Posner, *Econ. Analysis of Law*, 16; R. Posner, "Problematics," 1646-8; R. Posner, "Social Norms, Social Meaning, and Economic Analysis of Law," *Journal of Legal Studies* 27(2):553-565 (1998), 565; and Robert Ellickson, "Law and Economics Discovers Social Norms," *Journal of Legal Studies* 27(2):537-52 (1998).

[16] KS, 397-99 (contrasting "experts" with citizens with limited capacities to comprehend policy analysis and who "mistakenly" approve policies that are not welfare-optimal).

[17] Posner, "Problematics," 1666, 1680; Shavell, Foundations, 600-2 (moral notions are a type of "sentiment").

This reduction of appeals to justice and fairness to mere expressions of sentiment is deeply problematic. While moral (and aesthetic) judgments differ from many claims in the natural sciences, they also differ from expressions of taste. When I express a taste, such as "Canary wine is pleasant," and someone challenges me, there is nothing more I can say; when I express a moral or aesthetic judgment, such as "Mahler's 9th symphony is a great work," or "bank robbers deserve to be punished," and someone challenges me, if I were to back up my judgment simply by saying "That is just my preference," I would prove myself an incompetent judge. A competent judge in these contexts points to reasons beyond merely having a preference or liking.[18]

Act vs. Rule-Utilitarianism and the Role of Social Practices

Reducing moral arguments for justice and fairness to expressions of taste is one way some law and economics proponents reveal an insufficient understanding of the reasons available when we justify our actions. Another way is by failing to recognize the important role social practices play in providing reasons for acting. Since utilitarianism is a moral theory in telling us how we ought to act, law and economics critics of a moral point of view are critical really of moral points of view that are not utilitarian. But to be more precise, they are critical of moral points of view that are not act-utilitarian.

[81] Act-utilitarians regard an act as justified if doing the act leads to greater utility than not doing it. Rule-utilitarians, in contrast, hold that an act is justified if there is greater utility in adhering to a rule requiring we do the act than in not adhering to that rule. Rule utilitarians have us determine what practices we should adopt based on the principle of utility, but, they argue, having adopted the practice and participating in it, we are bound by its rules and do not decide what to do by considering the utility of the act.[19] The baseball batter must return to the dugout when he gets his third strike not because doing so is "best on the whole." He must because he has struck out.[20]

Deference to social practice can seem irrational to the act utilitarian, and does seem irrational to a number of law and economics proponents. Kaplow and Shavell argue that "if [the reason for having] social norms is to promote individuals' well-being, it would be a non-sequitur to elevate social norms into independent evaluative principles that are to be given weight at the expense of individuals' well-being."[21] To them, that a practice requires that we keep our promises, or punish the guilty in proportion to their culpability, is not a good reason to do so. We should do so only if individuals are made better off according to a utility calculation. Law and economics proponents tend to understand social practices as mere behavioral regularities and not as exogenous forces, and rules of practices as summary rules, rules that merely summarize regularities and provide no reason for acting with weight independent of their utility.[22] To give independent weight to the rules of social practices in deciding what to do violates their assumption that social evaluation is to be based only on individual well-being.[23] We should value

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[18] Hanna Pitkin, *Wittgenstein and Justice* (Berkeley: University of California Press, 1972), ch. 10.
[19] John Rawls, "Two Concepts of Rules," *Philosophical Review* 64:3-32 (1955).
[20] Cf. Rawls, "Rules," 25-27.
[21] KS, 71; cf. 76-77, 390-1, 771. Cf. Shavell, *Foundations*, 607 (moral notions are useful guides but 'inevitably fail' in some circumstances, being simple and general so they can be easily learned and applied).
[22] Eric Posner, *Law and Social Norms* (Cambridge: Harvard University Press, 2000), 26 (social norms aren't exogenous forces but "behavioral regularities").
[23] Shavell, Foundations, 597 and n.4; cf. KS, 16.

laws and practices not because of anything intrinsic to them, but only insofar as they enable individuals to obtain positive future returns, or "personal (non-altruistic) economic gains."[24] One of the central points in John Rawls' "Two Concepts of Rules," in which he articulates the theory of rule-utilitarianism, is that rules of practices are not summary rules; they are rules that give meaning to our actions. The rules define the practice and are logically prior to the performance of an action within the practice, so that to explain or defend one's actions within a practice one must appeal to the rules and not to some other principle, such as utility.[25] This is not to say that we should never reevaluate our practices or their rules using the principle of utility, but it is to recognize a distinction between justifying practices, which is a legislative function, and justifying actions within practices.[26]

Rawls is attentive to the nature of justification in a way that many law and economics proponents are not. He notes that a justification "is an argument [82] addressed to [and seeking to convince] those who disagree with us."[27] What counts as an appropriate and persuasive argument will depend on our point of disagreement. Justifying a convict's punishment to the convict who believes he was innocent differs from justifying his punishment to a philosopher who doesn't think we should have the practice of punishment: their concerns are different, and different responses are appropriate. In the former case a judge could point to the criteria established in the law for determining guilt; in the latter case, one could point to the (utilitarian or non-utilitarian) reasons why we punish rather than do nothing or respond in other ways to acts we call crimes. Justification is contextual.

When we justify social policies, we seek to persuade, and an effective strategy for doing this, employed at least since Socrates practiced the elenchus, is to arrive at a position that fits with other judgments that we hold so that we are comfortable with the position. When lawmakers (be they legislators or judges) decide what sanctions to establish for a crime, whether the insane should be punished, whether illegally obtained evidence should be excluded from trial, or whether there should be restrictions against carrying concealed weapons, they confront substantial moral issues that are also matters of social policy. The question is "what is to be done" and is answered by evaluating various considerations. My criticism of law and economics is limited to those proponents who take a totalizing point of view that excludes considerations that are not act-utilitarian. It must be distinguished from the criticism some have made that economic analysis is inappropriate in explaining or deciding upon policy concerning the personal sphere of non-market activity (such as marriage, rape, or non-commercial promises).[28] Economic considerations are often important in the personal sphere and are undeniably important in deciding how government should allocate its scarce resources. Obviously we should not provide costly corrective justice for a trivial harm.[29] Whenever we must use institutions to promote our ideals, we are forced to take costs into account. But we should not lose sight of the ideals—both utilitarian and non-utilitarian—the institutions and its rules are intended to promote. Government would not be economically viable if every unjust action by an individual that causes harm or disappoints were remedied or punished using legal mechanisms. But it is a mistake to infer from

[24] E. Posner, 53.
[25] Rawls, "Rules," 25.
[26] Rawls, "Rules," 32 (not inferring that one should accept existing practices), 27- 30 (on the distinction of offices).
[27] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 580.
[28] Claire Hill, "Law and Economics in the Personal Sphere," 29 *Law and Social Inquiry* 219 (2004)("the personal sphere is simply outside the ambit of what law and economics can describe").
[29] KS, 97.

this that the question of what is to be done is a purely economic problem to be decided by a utilitarian calculation.

II. Limits of Law and Economics as an Explanative Theory

My primary objective is to point to the limitations of law and economics as a normative theory insofar as it excludes moral points of view that are not act-utilitarian (section IV), but I also want to indicate why that approach may be limited as an explanative theory. Practices such as punishment, or promising, create reasons for [83] acting. It is possible to explain actions without appealing to the reasons held by the actors—doing so is fundamental to the theories of Marx, Freud, evolutionary psychologists, and cultural materialists such as Marvin Harris, all of whom claim that human behavior is shaped by forces of which the actors are unaware. Harris argues that while Jews and Muslims explain why they don't eat pork by appealing to religious doctrine, the true cause of their behavior is materialist: their ancestors lived in hot, arid regions, pigs don't sweat, and so expending resources to domesticate pigs in an environment hostile to pigs was inefficient. The religious taboo arose as a reason for the proscription on eating pork, but the cause is ecological.[30] Law and economics proponents similarly claim to uncover the true ground or cause of behavior—the pursuit of economic efficiency or welfare—even though judges and other actors who produce legal policy may be unaware of that ground and may themselves appeal to non-economic reasons such as justice or fairness.[31] It doesn't matter to these proponents if people don't actually calculate like act-utilitarians (and some studies suggest that people do not or are unable to calculate expected utilities;[32] and that emotions are central to how people with normal brain functioning form moral judgments[33]). All that matters is that we can understand their behavior "as if" they did.[34]

There are sometimes good reasons for seeking causal rather than reason-based explanations. People may not understand or appreciate why they act as they do. Marx and Freud looked for underlying causes of behavior precisely because they believed people had a false or incomplete self-consciousness. It makes no sense even to speak of reason explanations where the objects of study lack self-consciousness and intentionality, as is generally the case in the natural sciences. The power of a cause as opposed to a reason-based explanation may be its ability to predict. If, for example, we can predict that by instituting a certain enforcement level and high sanctions, crime would decrease along with government expenditures on law enforcement, this could be an important consideration for legislators, to be evaluated along with other considerations. The case for dismissing reasons for action when explaining human behavior is weaker, however, when those reasons have been articulated following deliberation and defended

[30] Marvin Harris, *Cows, Pigs, Wars, and Witches* (NY: Vintage, 1989), 35-45.
[31] R. Posner, *Econ. Analysis of Law*, 23 ("the true grounds of legal decisions are concealed rather than illuminated by the characteristic rhetoric of opinions").
[32] Cass Sunstein, "On The Psychology of Punishment," in Parisi and Smith, 342, 353.
[33] Michael Koenigs, Liane Young, et.al., 'Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgments," *Nature* 446(7138):908-11 (2007)(patients with ventromedial prefrontal cortex lesions are more likely to endorse utilitarian solutions to a moral dilemma and less likely than normal subjects to exhibit emotional responsivity such as shame, guilt, and compassion).
[34] Milton Friedman, "The Methodology of Positive Economics," in *Essays in Positive Economics* (University of Chicago Press, 1953); R. Posner, *Econ. Analysis of Law*, 4; Becker, "Crime and Punishment"; and Easterbrook, 330-1.

against objections; or when the reasons make reference to rules of practices that constitute the meaning of actions within practices.

One reason to be skeptical of "as if" explanations of human behavior is that they may be wrong. A paradigmatic cause-explanation in law and economics [84] is deterrence theory, which explains features of the criminal law by understanding punishment as a price for offenses, and predicts outcomes by assuming that effective deterrence is achieved by setting the expected utility of crime to be negative.[35] Empirical evidence indicates there are sentencing disparities for vehicular homicide based on the gender and race of the victim that deterrence theory cannot explain and would not predict.[36] Some criminologists argue that contrary to what deterrence theory predicts, sanctions sometimes lead to an increase in crime when offenders experience sanctions as illegitimate or unfair, are marginalized, and become defiant.[37] And some have argued that some people are not deterred, because they either conform to social norms and therefore obey law without threats of a sanction, or have a self-perceived invincibility that makes them undeterrable.[38]

Law and economics proponents can make "internal" criticisms of the standard model of deterrence to account for anomalies that result when punishment is treated as a price, while still working within an economics framework. For example, Cooter acknowledges that when we treat punishment as a price, we tax as opposed to forbid crime, and at times we want to forbid by using a sanction. But rather than appeal to a non-utilitarian explanation of the use of sanctions as opposed to prices, such as that certain behaviors such as rape and murder deserve condemnation and are not to be regarded as permissible so long as one pays the price, Cooter invokes efficiency criteria to account for when we use prices as opposed to sanctions: we choose sanctions only where, if crimes were priced, error in price-setting would yield disutilities and the information costs we would have to pay to effectively price crimes is prohibitive. Where legislators observe community standards or social norms of behavior but not costs and benefits of the behavior, it is efficient to use sanctions.[39]

What at first glance looks like non-economic determinants of behavior such as adherence to social norms and moral ideals, is also accounted for within the law and economics framework by internal critics of the standard economic model, sometimes by incorporating preferences for moral condemnation into a utility [85] function.[40] Dau-Schmidt relaxes a common assumption

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[35] In addition to the works cited in notes 3-4, above, see R. Posner, "An Economic Theory of the Criminal Law," 85 *Columbia Law Review* 1193 (1985); Shavell, "Criminal law"; Easterbrook, 292; and KS, 317-18.

[36] Glaeser and Sacerdote (Arguing that vehicular homicides with female victims yield 59% longer sentences and with black victims, 60% shorter sentences, and since the act is random and not deterrable, only a "taste for vengeance" explains the disparities).

[37] Lawrence Sherman, "Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction," *Journal of Research in Crime and Delinquency* 30(4):445-473 (1993).

[38] E. Posner, 3-5 (on non-legal mechanisms of cooperation); David Anderson, "The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging," *American Law and Economics Review* 4(2):295-313 (2002)(interviews inmates and finds many aren't deterred by sanctions); Greg Pogarsky, "Identifying 'Deterrable' Offenders," *Justice Quarterly* 19(3):431-42 (2002)(distinguishing two classes of non-deterrables: "incorrigibles" and "acute conformists" based on sample of 412 survey respondents); but see Bradley Wright et.al., "Does the Perceived Risk of Punishment Deter Criminally Prone Individuals?", *Journal of Research in Crime and Delinquency* 41(2):180-213 (2004), 188, 206 (criticizing Pogarsky's circular method of identifying "acute conformists").

[39] Robert Cooter, "Prices and Sanctions," 84 *Columbia Law Review* 1523 (1984), 1532-3.

[40] Kahan, 619; Dau-Schmidt; Robert Frank, "Departures from rational choice: with and without regret," in Parisi and Smith, 20-25; E. Posner, 5-6, 39, 49-53. See also Richard Murphy, "Property Rights in Personal Information: An Economic Defense of Privacy," 18 *Georgetown Law Journal* 2381 (1996)(considering the "psychic" value of privacy as a "pure privacy preference" one could enter into a utility calculation to determine privacy law).

made by economists that preferences are exogenous, or taken as given, in order to account for the "moral dimension" of punishment. He argues that fundamental characteristics of the criminal law are best explained by regarding punishment not merely as a tax or price, but as a means of discouraging deviant preferences. Dau-Schmidt takes into account the moral point of view but from within a thoroughly economic framework: we rely on moral norms to shape preferences because the costs of policing externalities in an amoral society would be prohibitive.[41] Eric Posner also attempts to integrate social norms into an economic theory of the law. Rather than give independent weight to non-efficiency goals such as justice or fairness, which might otherwise seem to explain features of the law, he regards these values or norms as means by which individuals signal that they are desirable partners in cooperative endeavors and therefore as mechanisms to promote social utility.[42] He explains the decrease in shaming punishments such as branding and pillories by theorizing that shaming punishments may encourage deviant sub-communities, and are messy and unpredictable (e.g. mob lynchings), so there is no reason to believe that they provide "the proper level of deterrence" that efficiency theorists expect to observe.[43]

While these internal criticisms of the standard economic model of law recognize that practices, norms, and moral values influence human behavior, economic explanations of the law remain problematic. Law and economics proponents, even those who modify the theory to account for social norms and apparently non-rational or altruistic behavior, often claim to explain why the law arose, when what they really seem to be doing is imputing reasons or offering justifications for features of the law. But they leave unclear why we should favor their explanations or reasons over others that are available. Glaeser and Sacerdote claim to explain why there are more severe punishments for arson or gang killings than for murders that occur following a romantic argument, and Posner explains why hanging was imposed for horse thievery in the American West (we should expect higher sentences when the apprehension rate is low, according to the expected utility model).[44] Shavell claims to explain why the law does not allow a defense [86] for a criminal whose victim later condones the criminal (this would dilute deterrence and create an incentive to coerce victims into condoning).[45] Shavell, Posner, and Easterbrook claim to explain why we allow an insanity defense or reduce punishment for the "feeble-minded" (punishment is unlikely to deter and be efficient).[46]

But there are plausible competing accounts of most of these features of the law. We punish intentional crimes such as arson or gang killings more severely than crimes of passion because the former crimes are more blameworthy and their perpetrators more culpable and deserving of punishment. This explains, too, why we allow an insanity defense: not because punishment would not deter the insane, but because the insane are not blameworthy.[47] Lastly,

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[41] Dau-Schmidt, 22; 28-30, 37.

[42] E. Posner, ch. 6. But see Ernst Fehr and Simon Gächter, "How Effective are Trust and Reciprocity-based Incentives," in Avner Ben-Ner and Louis Putterman, eds. *Economics, Values, and Organization* (Cambridge University Press, 1998), 337-63 (providing conflicting evidence that norms are followed even when interactions are anonymous and so there is no possibility of signaling); and Fehr and Gächter, "Altruistic Punishment in Humans," *Nature* 415:137-140 (January 10, 2002).

[43] E. Posner, 93.

[44] Glaeser and Sacerdote, 368; R. Posner, *Econ. Analysis of Law*, 230.

[45] Shavell, "Criminal law," 1258.

[46] Shavell, "Criminal law," 1254-5; R. Posner, "Economic Theory of Criminal Law"; Easterbrook, 325; cf. Dau-Schmidt, 26-7 (intent reveals a preference to deviate from norms).

[47] Mark Tunick, *Punishment: Theory and Practice* (Berkeley: University of California Press, 1992).

condoning is not a defense because the point of legal punishment is to uphold community standards of justice and not to avenge the victim, and so the victim's feelings toward the criminal are beside the point from a moral point of view. In the face of competing explanations, something needs to be said about why one explanation is superior.

Laws and social practices arise for a number of reasons. Among the reasons legal punishment arose are to deter, incapacitate, express condemnation, stigmatize, rehabilitate, and vindicate the law. All of these may be reasons for acting within the practice and can explain some of its features. Deterrence and expected utility theory may provide the most convincing account of some features of the practice, such as why horse thieves were hung in the American West (for surely they did not deserve such harsh punishment).[48] The actual cause of the practice may be a question historians can best answer. But when we are dealing with complex practices that express ideals and involve purposeful action, practices that may have arisen for a multiplicity of reasons, we should not expect that a single goal such as economic efficiency or utility maximization best explains all features of the practice. One reason to prefer economic explanations of the law would be if they point to a model that led to an optimal set of policies, but this shifts the debate away from merely descriptive and explanatory theory to normative theory; and there are reasons to be skeptical of a normative economic approach to law that excludes considerations other than those of an act-utilitarian.

III. Limits of Law and Economics as a Normative Theory

I shall take as an exemplar of a normative theory in law and economics that takes a totalizing point of view the theory presented in Kaplow and Shavell's book *Fairness vs. Welfare*. They argue that rules of law designed to comply with the principles of welfare economics leave (virtually) everyone better off than they would be under any other rule, whereas rules of law designed to comply with principles of fairness or justice would leave some or all of us worse off. It is important to recognize two [87] distinct sorts of criticisms that can be made of Kaplow and Shavell's approach. An internal criticism challenges their conclusions from within a law and economics framework by arguing that they fail properly to weigh the utility of justice or fairness in their economic calculations; in contrast, an external criticism challenges their fundamental assumption that welfare or social utility is the only valid criterion for deciding upon legal policy.

Internal Criticism

I first shall consider an internal criticism, focusing on their discussion of punishment. Their argument for rejecting non-utilitarian considerations such as retribution or fairness as independent grounds for deciding how to punish depends on their claim that a fair sanction is inferior to the sanction dictated by welfare economics. To reach this conclusion they offer a simple sanctioning model: They suppose a crime causes harm of -100 utiles, there is a 25% probability of apprehending the criminal, and that if convicted, the cost of the sanction is x to the criminal plus $2x$ to the public (to cover the cost of imposing punishment). They assume the fair sanction is equal to the harm caused (or -100 utiles), and that there are 1,000 people who obtain a benefit of more than 25 utiles if they commit the crime and who will therefore do so when the fair sanction of -100 is threatened, since their benefit from committing the crime will exceed the

[48] Of course one might argue that executing horse thieves was really not a feature of but an aberration from the practice of legal punishment.

expected disutility of punishment (which is 25% of 100, or 25). On these assumptions, using the fair sanction will result in 1000 crimes, and 250 people will be caught and punished. Each punishment has a disutility of 100 to the criminal and 200 to the society.

Whereas the fair sanction matches the punishment to the harm caused by the crime, the efficient sanction recommended by welfare economics, they argue, matches the expected disutility of punishment to the harm caused. In our example, the efficient sanction is -400 (as 400 x 25% = 100), four times greater than the fair sanction. They then compare the total social utility of using the fair sanction with the total social utility of using the sanction recommended by welfare economics. With the fair sanction of 100, 1000 crimes will occur, creating -100,000 utiles. There will also be -75,000 utiles from punishing 250 people (-25,000 experienced by the criminals plus -50,000 in social costs), yielding a total of -175,000 utiles. Using the unfair but efficient sanction of -400, they argue, there will be no crime, thus a total cost of 0. On this basis they conclude that an efficient sanction is superior to a fair sanction, and that punishing on the basis of retribution or fairness leads to individual suffering: non-criminals are worse off as they are more likely to be crime victims, and criminals who are caught are worse off as they would have been deterred if we used the efficient sanction. On their view, only criminals who are not caught are better off when the sanction is fair since they get the benefits of the crime, whereas if the sanction were -400, they would not since they would have been deterred. They conclude that "[t]he actual consequence of fair punishment is to make all individuals worse off except for the criminals who are not caught."[49]

[88]An internal criticism of this argument does not take issue with the use of a utilitarian calculus to determine how we should punish, but challenges some of the assumptions Kaplow and Shavell make. Consider the following example that modifies some of these assumptions while keeping the model simple. Suppose a crime still causes -100 utiles (which includes the harm to the victim and secondary harm to society at large) and the probability of apprehension and conviction of those committing the crime remains 25%. The sanction is not free to impose: assume it still costs $2x$ to impose a sanction of $-x$ utiles, a cost shared by society at large, so that the cost of the sanction to an individual member of the public averages $2x/N$, where N is the population. Suppose that half the members of society have a strong moral sense and oppose unfair punishment. If a person is sentenced excessively, half the population experiences a sense of demoralization, anxiety, profound disappointment in and mistrust of their government, and for each unit of excessive punishment imposed on anyone in their society, they experience a disutility of -.001 utiles. The total disutility from excessive punishment imposed in this society for each case of such punishment is expressed by (.5N)(ES-FS)(.001), where FS is the fair sanction, equivalent to the disutility caused by the act, and ES is the efficient sanction that yields an expected disutility equal to the disutility caused by the act, or FS divided by the probability of apprehension and conviction.[50] With a crime resulting in -100 utiles, FS=-100, ES=-400. Assume also that if society imposes FS, N/500 people will commit the crime, and that if society imposes ES, N/5000 people will commit the crime. Kaplow and Shavell assume that no one will commit a crime if the expected utility of doing so is negative, but I have relaxed this assumption because it

[49] KS 317-322.

[50] The marginal disutility of excessive punishment probably diminishes with the number of criminals excessively punished, but I assume a linear relationship to keep the model simple. Of course this assumption becomes increasingly unrealistic as N, and thus the number of offenders, increases.

seems unrealistic.[51] There will be no disutility associated with excessive punishment when a fair sanction is imposed. On this model, using the above assumptions, society will be better off in terms of total utility using FS rather than ES if the population is larger than 9,000.[52]

The internal criticism of a law and economics approach takes into account preferences for fairness; and by assuming that crimes still occur when the expected utility of committing the crime is negative, it modifies the assumption that actors [89] are perfectly rational. The criticism is internal because it works from within the law and economics framework, according to which notions of fairness or corrective justice "receive no independent weight in the assessment of legal rules," and policy is made with the "exclusive use of welfare economics"—only individuals' well-being is factored into a policy decision.[53] External critics argue, in contrast, that the law and economics point of view does not adequately account for important considerations such as justice or fairness.[54] That concern is not necessarily met merely by including justice or fairness as preferences that receive weight in a utility calculation.[55] External critics challenge the assumption that social utility or individuals' well-being is the only valid criterion for deciding how one ought to act or what public policy ought to be.

External criticism

The list of critics of Bentham's single-minded utilitarianism is legend, their criticism vituperative: Utilitarianism's most influential theorist is a "frightfully radical ass" (Goethe), a "worm…responsible for [civilization's] decay" (Keynes), his philosophy "stinking" (Emerson), "shallow" (Schumpeter), and "insipid" (Marx).[56] More recently, Martha Nussbaum criticizes the utilitarian/economists' use of aggregate data, which fails to tend to the "diverse concreteness" of

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[51] Kaplow and Shavell are inconsistent. They rely on the assumption that people will be deterred if expected utility is negative to establish that ES is superior to FS; but later they say "most individuals are unaware" of legal rules and even if they are, won't be influenced by them due to their filtration through lawyers and other intermediaries (KS, 416).

[52] When FS is imposed there will be N/500 crimes yielding a disutility of (N/500)(100) or .2N. 25% of (N/500) will be convicted and punished, yielding a disutility of (N/500)(.25)(100) for those punished, and of twice that for society. The total disutility of imposing FS is .2N + .15N=.35N. When ES is imposed there will be N/5000 crimes yielding a disutility of (N/5000)(100) or .02N. .25% of (N/5000) will be convicted and punished, yielding a disutility of (N/5000)(.25)(400) for those punished, and of twice that for society, or .06N. There will be disutility associated with excessive punishment of (.5N)(300)(.001)(N/5000)=.00003N^2, so the total disutility when ES is imposed is .08N + .00003N^2. Society will be worse off in terms of total utility using ES when .00003N^2 +.08N>.35N, or for N>9,000.

[53] KS, 4-5, 26.

[54] For example, Jules Coleman, "Crime, Kickers, and Transaction Structures," in Pennock and Chapman, eds., *Nomos 27: Criminal Justice* (NYU Press, 1985), 313-28, 323-4 (law and economics leaves out moral notions of guilt and fault and is "impoverished" because it analyses behavior exclusively as exchange relations); Mark D. White, "A Kantian Critique of Neoclassical Law and Economics," *Review of Political Economy* 18(2):235-252 (2006), 246 (law and economics ignores the "moral nature of punishment"); Stephen Schulhofer, "Is there an Economic Theory of Crime?" in *Nomos 27*, 329-44, 336 (in viewing punishment as simply a price, the law and economics approach leaves out the notion of fault); Debra Satz, "Markets in Women's Sexual Labor," *Ethics* 106(1):63-85(1995), 69-70.

[55] Mark D. White is critical of Kaplow and Shavell for failing to take seriously the taste for fairness, and suggests that if that taste were made strong enough, their conclusions could be reversed, in "Preaching to the Choir: A Response to Kaplow and Shavell's Fairness Versus Welfare," *Review of Political Economy* 16(4):507-15 (October 2004), 512. But he also suggests an external criticism in asking us to challenge the assumption about the moral primacy of well being (514).

[56] Cited by Hanna Pitkin, "Slippery Bentham," *Political Theory* 18(1):104-31 (1990), 104.

people—a criticism Dickens made with devastating effect in *Hard Times* in contrasting Gradgrind and Bounderby, utilitarians concerned only with facts, numbers, and self-interest, with the far more humane Sissy Jupe. For Nussbaum, the economic mind is blind "to the fact that human life is something mysterious and not altogether fathomable."[57]

Appeal to the mysterious and unfathomable is precisely the irrational move Kaplow, Shavell, and other law and economics proponents want to avoid and replace with clear-thinking and rational argument. But critics of utilitarianism [90] have legitimate concerns when challenging the assumption that, in deciding what to do, we should appeal solely to welfare or preference satisfaction. One concern some of these critics raise is that we often regret our preferences; these critics ask, what is so valuable about seeing to it that individuals get the things they want?[58] Some values, the utilitarian critic might say, are "priceless," although it is better to say not that they are priceless, but that they are not readily measured and therefore are hard to take into account in a utilitarian calculation. Integrity (being able to live with oneself), having a sense of worth, living a meaningful life—none of which are reducible to preference satisfaction or individual well-being unless those concepts are so expanded as to make them vacuous—are not so mysterious as to be incoherent or unintelligible.[59] Because they can not be measured as required by welfare economics, it is not surprising they are not taken seriously within a law and economics framework. But—and this is the key idea underlying the external criticism of normative law and economics I wish to present—we misconstrue the justification process if we think that the only way to recognize the force of a consideration is by giving it an economic measure of worth that is weighed in a calculation of net utility. The complex problems arising from the human condition of sharing a world with people holding conflicting values are not necessarily best resolved by forcing solutions merely because they can be arrived at using the tools available to the economist.

The following examples may suffice to show that there are reasons for rejecting policy prescriptions of law and economics proponents, or of act utilitarians, reasons that are not mysterious, unfathomable, or unintelligible, having been articulated following deliberation and defended against objections.

Disproportionate punishment. In a law and economics approach, disproportionately harsh punishment is prescribed because it is efficient in allowing reduced enforcement levels. By singling out the unlucky or especially inept criminal, society can purchase general deterrence cheaply. External critics of the law and economics approach object that this is unfair and, invoking Kant, that it treats the criminal merely as a means for furthering social goals, thereby failing to respect him also as an end in himself.[60] Kaplow and Shavell find this objection "incorrect" or at least "very misleading" because the convicts are not being used "merely" as a

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[57] Martha Nussbaum, "The Literary Imagination in Public Life," in Fred Kaplan and Sylvere Monod, eds., *Hard Times*, 3rd ed. (NY: W.W. Norton, 2001), 429-438, 433; cf. Schulhofer, 340 (Posner and Becker provide a limited perspective on the problem "what is man").

[58] Jules Coleman, "Review: The Grounds of Welfare," 112 *Yale Law Journal* 1511 (2003), 1540-1. Cf. Mark Sagoff, "Values and Preferences," *Ethics* 96(2):301-16 (1986), 303: "Why is it good *in itself* that a person who wants a Mercedes succeed in getting one?"

[59] On the danger of expanding or contracting the conception of "utility" so as to make utilitarian theory virtually useless, see Pitkin, "Slippery Bentham."

[60] Immanuel Kant, *Groundwork of the Metaphysic of Morals*, tr. Paton (NY: Harper and Row, 1964, orig. 1785), 95 (428 in Royal Prussian Academy edition) ("Now I say that man…exists as an end in himself, not merely as a means for arbitrary use by this or that will: he must in all his actions…always be viewed at the same time as an end"); cf. White, "Kantian Critique."

means, and by deterring others, innocent victims of crime have their humanity respected.[61] But to the external critic, in using aggregate data about overall deterrence, the utilitarian loses sight of the concrete individuals who are confined to prison for the rest of their lives in order to help promote a policy of general deterrence; and to [91] some external critics, the certain harm or disutility to the identifiable convict who is singled out for excessive punishment is a greater concern than the probabilistic harm or disutility to the unidentified victims of those who would not be deterred without a policy of excessive punishment. The tendency of law and economics proponents not to take seriously the rights of individuals because doing so would be non-optimal from a utilitarian perspective is evident in a recent article that recommends severe penalties for juveniles, including death, as well as an enforcement policy that allows states to violate their rights and pay compensation later if a mistake is made, in the name of effective deterrence.[62] It is also evident in Easterbrook's defense of judicial discretion in sentencing; such discretion as a rule facilitates efficient pricing of crime. Although individual judges may be erratic and "out of line" with the going price, in general the market provides checks on "errant judges."[63] The argument asks us to compare paying the wrong price in a market, with individuals spending perhaps an extra year or more of their lives in prison, and these seem incomparable.

Privacy. A black man is photographed in a public place without his knowledge, and the picture appears on the cover of a national newsmagazine to illustrate a feature story about the black middle class, a story the man finds objectionable. He is embarrassed: perhaps he doesn't like his appearance, or doesn't want friends associating him with the article's message, or he simply likes to be anonymous. Should the law afford him a remedy?[64] One law and economics solution is that in such non-newsworthy situations, individuals should control the right to publish their image as this will yield greater social utility—otherwise, anybody could threaten to publish a photograph of an individual, who might then have to negotiate with numerous parties to avoid publication.[65] The individual's disutility is great, whereas the publisher could easily and cheaply have gotten a different but equally suitable photo. If the image is newsworthy, however, the utility calculation ends up favoring the public.[66] *Ex ante*, the man's expected disutility may be unknowable: if he only cares about the photo once he sees it published, but could not be sure prior to its publication that a photographer would succeed in having it published in a prominent place, or if his disutility depended on factors beyond his control, such as the response of the public, friends, former acquaintances, or fellow workers, how could he determine *ex ante* the value of suppression he would be willing to pay prospective publishers? Still, we can surmise that the cost to the publisher of [92] granting the right of publication to the individual is not substantial, involving only the pursuit of someone willing to sign a consent form. But rather than think the issue is settled by a utility calculation, we might think that individuals, who may be

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[61] KS, 333-5.

[62] Moin Yahya, "Deterring Roper's Juveniles: Using a Law and Economics Approach to Show that the Logic of Roper Implies that Juveniles Require the Death Penalty More than Adults," 111 *Penn State Law Review* 53 (2006) (arguing that if juveniles have an inelastic demand for crime, being impulsive and less mature, the price of crime should be raised for them for the sake of efficiency).

[63] Easterbrook, 329.

[64] Cf. Arrington v. New York Times, 449 N.Y.S. 2d 941 (1982) (ruling that the photographer and agent but not the publisher may have violated plaintiff's rights; the law was later amended to protect photographers and agents).

[65] Cooter, *Strategic Constitution*, 287; cf. Joseph Siprut, "Privacy through anonymity: an economic argument for expanding the right of privacy in public places," 33 *Pepperdine Law Review* 311 (2006) (giving the public domain the right is "highly inefficient," putting the image in a lower-valued use), 324-5.

[66] Siprut, 325.

unable to pay if the right to publish lied with the publisher, should not have to bargain for their privacy.[67] That this argument loses much of its force when the subject of the photograph is newsworthy does not mean that the value of privacy is reducible to utiles.

The exclusionary rule. The exclusionary rule prohibits the use of evidence against a defendant if the evidence was obtained in violation of the defendant's constitutional rights. Courts, consistent with a law and economics approach, have restricted the rule on the ground that it is thought to be justified solely as a deterrent to illegal searches, and in situations where the police would not be deterred, as when they act in good faith, the exclusionary rule should be waived.[68] But deterrence is not the only rationale for the exclusionary rule, which was originally defended by appealing to the value of judicial integrity.[69] Due process, and not just crime control, is an essential goal of the criminal law.[70]

Population policy. Richard Posner defends a policy in overpopulated societies that permits only one child per couple but that allows families who are more efficient in producing children to exceed the one-child limit by purchasing permits from less efficient families. It might cost family *A* less to produce a second child than it would cost family *B* to produce a first child "of the same quality," and so allowing *A* to buy *B*'s permit would be efficient.[71] The external critic objects to using a measurement for the quality of a child to support this policy prescription.[72]

Gun control policy. John Lott argues that regressions on crime data show that where people are allowed to have guns, there are fewer violent crimes.[73] From a utilitarian perspective this would seem to dictate that we ease gun restrictions. Let us leave aside the internal criticism that Lott can run his regressions only on the data he has available, and that had we better information, another regression might show his conclusion is wrong. To the external critic, Lott's argument is not decisive because there are fathomable but non-quantifiable reasons to object to a community in which people carry concealed weapons.

The death penalty. Utilitarians prescribe the death penalty if its use would increase social utility. To retributivists, the appropriateness of the death penalty [93] depends on whether the criminal deserves it, and if society sometimes needs to invoke it to express blame, whether it did so would not depend on the empirical evidence about the marginal deterrent effect of the death penalty.[74]

In each of these examples, there are non-utilitarian reasons for a policy that do not seem mysterious, unfathomable, or unintelligible. The reasons may not convince the economist, but my purpose is to show not that they are decisive reasons, only that they are worth consideration.

Practices or institutions such as punishment, promising, marriage, private property, or voting, arose in the pursuit of various ideals. These ideals became institutionalized, and this

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[67] For non-utilitarian defenses of privacy see, e.g., Charles Fried, "Privacy," 77 *Yale Law Journal* 475 (1968); Edward Bloustein, "Privacy as an Aspect of Human Dignity," in F. Schoeman, ed., *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984).

[68] U.S. v. Leon, 468 U.S. 897 (1984); R. Posner, *Econ. Analysis of Law*, 683-4 (while the exclusionary rule is needed to deter illegal searches, we should not apply it so as to over-deter, and a tort remedy is economically preferable).

[69] Mapp. v. Ohio, 367 U.S. 643 (1961), 659.

[70] Herbert Packer, "Two Models of the Criminal Process," 113 *University of Pennsylvania Law Review* 1 (1964).

[71] Posner, *Econ. Analysis of Law*, 156.

[72] See Margaret Jane Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 2001).

[73] John Lott, *More Guns, Less Crime* (Chicago: University of Chicago Press, 2000).

[74] See, e.g., Louis Pojman's discussion in Pojman and Reiman, *The Death Penalty: For and Against* (Lanham, Maryland: Rowman and Littlefield, 1998); Walter Berns, *For Capital Punishment* (New York: Basic Books, 1979).

forces us to consider the costs of these institutions in deciding how much of society's limited resources should be devoted to their smooth functioning. But we should not lose sight of the ideals the practices either originally promoted, or have come to promote as practices evolve. Some practices, such as punishment, seek to promote multiple and even conflicting values.[75] Some values arise from no single practice in particular, such as the value of privacy, or of living in a community based on trust and not fear.

Human behavior is complex, and we should strictly scrutinize theories that try to make sense of it by appealing to a single principle. Bentham, Kaplow, Shavell, and Posner may be motivated to take a totalizing approach by a hope of "escaping the risks and disorders of human relationships, by reconceiving those relationships in the language now used for physical objects and mechanical movement."[76] But that approach is unlikely to be persuasive because it takes as essential one consideration, the economics of our laws, practices and institutions, ignoring other ideals that may account for why we have them in the first place, or which may be essential to our finding them acceptable.[77]

I am not arguing that we should be concerned only with justice and that we should not consider the consequences of our decisions. For example, if our court system would collapse if all defendants sought trials, and the only way to avoid this was to practice plea-bargaining, then most of us will be persuaded that we need the practice even though plea-bargaining raises questions from the point of view of justice (in cases where guilty defendants who cop pleas are punished for a lesser offense having no relation to their actual offense, and innocent defendants are punished for something they didn't do). One need not reject consequentialist thinking if one is motivated by a concern for justice.[78] [94]

IV. The Demand for a Further Ground: Connecting Descriptive and Normative Theories

Law and economics proponents who take a totalizing point of view that excludes moral points of view that are not act-utilitarian regard non-consequentialist moral thinking as irrational or unintelligible. Any argument that appeals to justice or fairness, such as the argument that we should not punish the insane or impose disproportionate punishment such as $10,000 parking fines because doing so is unjust, to them begs the question "why be just or fair?"; and they deny that any further ground can be given for justice or fairness apart from the desire for those values. This demand for a further ground, which on their view is only provided by the principle of utility or a similar principle, is not a demand utilitarians themselves are able to satisfy when the demand is to justify why the principle of utility should be our criterion for acting. Kaplow and Shavell define welfare economics as the optimal approach to public policy, so that by definition any other approach is suboptimal. But they provide no reason for thinking welfare economics is the

[75] Tunick, *Punishment*, 177-79.
[76] Pitkin, "Slippery Bentham," 127.
[77] Cf. Pitkin, *Wittgenstein and Justice*, 186-88 (arguing that the contested character of justice derives from tensions resulting when ideas and purposes are institutionalized).
[78] Tunick, *Punishment*, 143-5 (discussing plea-bargaining); Mark Tunick, *Hegel's Political Philosophy* (Princeton, NJ: Princeton University Press, 1992), 34-5, 135-8 (Hegel appeals to retribution as well as to consequences in his theory of punishment); Satz, "Markets" (opposes prostitution because it promotes unjust gender relations, but opposes criminalizing prostitution because doing so would not be beneficial).

optimal approach, which is why critics characterize their argument as a tautology.[79] Even Bentham was unable to provide a further ground for the principle of utility.[80]

While Bentham did not think one can justify the principle of utility by pointing to any other ground, he did attempt to show that the principle of utility in fact guides us.[81] He offered an interpretation of existing practices that claims to show that their features, on the whole, can be explained as promoting social utility, and he criticized features of existing practice that failed to do this. In this way explanative and normative theory are connected. We are more likely to be persuaded by normative prescriptions that are based on principles that make sense of what we do, as they will cohere with judgments we already hold. A problem with the accounts of law given by Bentham and law and economics proponents is that their interpretations of existing practice are limited. In focusing only on some of the objectives of our practices and institutions they leave aside others, and so their explanations and normative prescriptions do not fit with many of our settled understandings and convictions.[82]

Some may object to the view that descriptive or explanative theory of our practices can be the basis for a normative theory. In deciding what we ought to do, why should we be constrained by conventional understandings of existing practices?[83] I have pointed to two reasons. In some contexts a justification is sought of an action within a practice and only reference to the rules or purposes of the practice may satisfy the concern about the action. Of course in other [95] contexts, such as legislative debates about what the law should be, we need not be bound by existing law or the authority of tradition. But even in that context it is helpful to understand and acknowledge the non-utilitarian ideals our law and practices promote, not merely because individuals have sentimental attachment to these ideals—attachments that the economist might try to weigh in a utilitarian calculation—but because they are important in ways that can not be measured in utiles. Among these ways, they may be part of a system of what most of us believe, a system in which some things are unshakeable and some are more or less liable to shift, and what stands fast does so because "it is held fast by what lies around it."[84]

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[79] White, "Preaching to the Choir"; Coleman, "Review," 1514; David Dolinko, "Review Essay: The Perils of Welfare Economics," 97 *Northwestern University Law Review* 351 (2002), 363.
[80] See text accompanying note 8, above.
[81] Bentham, *Principles*, ch. 14, §28.
[82] Cf. James Whitman, "A Plea Against Retributivism," 7 *Buffalo Criminal Law Review* 85 (2003), 104-5 ("we all know the distorted and eccentric picture of the legal world that results" from the simplified view of human behavior postulated by law and economics scholars).
[83] KS, 296 n.9 (ignoring "merely descriptive" theories claiming to articulate the meaning of legal practices such as punishment as not pertinent to those seeking a normative theory).
[84] Ludwig Wittgenstein, *On Certainty* (New York: Harper and Row, 1969, orig. 1950-1), §144; cf. §§ 96-99.